

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
)
Plaintiff,)
)
)
v.)
)
DZHOKHAR A. TSARNAEV, also)
known as Jahar Tsarni,)
)
Defendant.)
)

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, March 18, 2015
9:06 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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PROCEDINGS

2 THE CLERK: Good morning.

3 THE COURT: All right? Who wants to begin?

4 MS. CONRAD: I'm sorry. Go ahead.

5 MR. WATKINS: Judge, I think we're still in a little
6 bit of bedlam here. We do not have a list of witnesses out to
7 the end of trial. We have expected witnesses, but there seem
8 to be more that are being added, unless the government is here
9 to say that what we were supplied last night is out to the end
10 of trial.

11 We didn't get the list until I think 5:45 or so, and
12 then we got an updated list about today's witnesses with
13 exhibit numbers. So we got quite the late start on all this.

14 Ms. Conrad's about to correct me.

15 MS. CONRAD: We did not get exhibit numbers for all
16 the witnesses, even on the 648. I got the list we were sent.
17 There's a significant number with no exhibit numbers on them.
18 The list that we got last night at 6, whatever, p.m. included
19 Azamat -- I'm going to mess up the last name so I'm not even
20 going to try it.

21 And as I mentioned yesterday, we were not informed
22 that Azamat was even testifying this week until yesterday
23 morning. He is a significant witness with a large number of
24 prior statements, as well as prior trial testimony, which I've
25 feverishly been trying to review since we got out of court

1 yesterday.

2 But the government didn't even give us the exhibit
3 numbers for him until after 8 p.m. last night. And then -- and
4 I had mentioned this yesterday -- as with all the other
5 witnesses, they just gave us numbers. These numbers, unless we
6 have the load file, are not matched up to anything in our
7 possession. So we have an exhibit list that might just have
8 descriptors, but out of hundreds of thousands of documents we
9 don't know how to match those up.

10 We have received a load file through something like
11 Exhibit 400. We're well past that now. We understand an
12 exhibit load file has been prepared for us. It has not yet
13 been given to us. Last night, after I received at 8:09 p.m.
14 from Mr. Chakravarty the exhibit numbers for Mr. Azamat --

15 MR. WEINREB: Tazhayakov.

16 MS. CONRAD: -- I inquired after spending about 20
17 minutes searching to see what these exhibits were, what a
18 certain number was and said we didn't have it, and he responded
19 "Oh, that's a set of headphones." Well, it would have been
20 helpful to know that before I spent 20 minutes searching
21 through thousands of documents for this exhibit number. I
22 mean, this is just not helpful, it's not what the government
23 promised yesterday, it's not what the government said they
24 would do when we left and broke early yesterday. And from a
25 purely selfish point of view, it is not sufficient for me to

1 prepare Azamat's cross-examination for today.

2 On top of that, as far as Azamat is concerned, the
3 government provided -- some of the exhibits are -- a couple of
4 them are charts of text messages. We don't have the underlying
5 data except in the form of an unextracted view of his cell
6 phone. So now -- I mean, I just cannot, between yesterday at
7 one o'clock and this morning, or whenever Azamat's going to
8 testify, have someone try to extract that data and match it up
9 to these text messages.

10 So I know I sort of derailed Mr. Watkins, but I just
11 want to illustrate the seriousness of this issue. I mean, we
12 have been asking all along for something that -- I'm sorry.
13 The Court ordered two weeks in advance witnesses with exhibits.
14 To get something like this at 6 p.m. at night for the next day
15 is just not sufficient for us to adequately prepare.

16 MR. WEINREB: So, your Honor, in the normal case the
17 government provides -- both parties provide each other a
18 witness list and an exhibit list. Normally the exhibits are
19 not matched to particular witnesses. That's just something
20 that the defense learns as they go along.

21 We have no problem, you know, abiding by the Court's
22 order to give them a list that actually matches up particular
23 exhibits to witnesses, but it's something that we ourselves
24 don't make a call on until a day or two before we call
25 somebody. That's, you know, a realistic feature of trial

1 preparation, especially in a case going this fast. We bring
2 witnesses in for prep, you know, a day or two before they
3 testify and we start showing them things and going over things
4 with them and sometimes we toss this out, sometimes we realize
5 we need to add this. It's just not possible to do what they're
6 asking this far in advance. And we're doing our best. I mean,
7 we are giving it to them as soon as we, ourselves, have it
8 compiled and can give it to them.

9 With respect to the witness list to the end of the
10 trial, I think the Court said -- you know, that we agreed to do
11 that. And as the Court said, you know, there are always going
12 to be sort of last-minute calls that you make, adding a
13 witness, subtracting a witness, but it should be 90 percent
14 complete, and it is. As far as I know, the witness list we
15 gave is essentially a 90-percent accurate list of the witnesses
16 to the end of the guilt phase.

17 We don't yet have all the exhibits matched up to
18 particular witnesses, but 95 percent of the exhibits that will
19 be offered through those witnesses were on our exhibit list and
20 the defense has had it for weeks and weeks, if not months,
21 because we produced it at the end of December.

22 This business of the optical load file that has the
23 images or the copies of the exhibits with the numbers attached,
24 I never heard that phrase before yesterday. I'm sure somebody
25 else has in the government. But as soon as we were asked for

1 one, I inquired, and one was made and given to the defense.

2 So -- one was made. Maybe it hasn't been handed over.

3 MR. CHAKRAVARTY: There was an earlier one, but
4 there's an updated version which I think is what you're asking
5 for.

6 THE COURT: What is it?

7 MR. CHAKRAVARTY: It's a load file. It's our copy of
8 our -- the data in our Sanction database that we use to project
9 the images of the exhibits onto the court -- so that they would
10 have an exact duplicate of what we have. So they have one from
11 two weeks ago.

12 MR. WEINREB: I think there's another way of viewing
13 this whole thing, which is that we're being asked to do a lot
14 more in this case than the government normally does in a normal
15 case. Normally we don't give the defense our own optical --
16 you know, our own data presentation software for them to use.
17 That's their job to come up with their presentation for their
18 exhibits.

19 And, you know, the defense is allowed to look at the
20 exhibits. Oftentimes they come to our office and look at them,
21 and that's the exposure they get. And very commonly it happens
22 a few days before trial.

23 We don't have a quarrel with what we're being asked to
24 do substantively, it's just the speed which we could possibly
25 get it done accurately. You know, if we give them something

1 that's inaccurate, then they complain that it was inaccurate.

2 Yesterday we took the time, we did it for the number
3 of witnesses who we knew would be called today. These happen
4 to be very exhibit-intensive witnesses, so it's a little
5 different from how it might be with respect to, let's say,
6 civilians who just have a few witnesses [sic]. But to a
7 large -- to a large degree the exhibits on the list today are
8 photographs of things that were collected in various places.
9 There's just not much controversial about them, and the
10 photographs certainly were produced, you know, a year ago.

11 THE COURT: What's today like? What do you --

12 MR. WEINREB: So today is almost entirely going to be
13 forensic evidence about the -- I'm sorry -- testimony about the
14 forensic collection of evidence at the Watertown crime scene.
15 There will be the collection of explosives evidence at the
16 crime scene, ballistics evidence at the crime scene, some blood
17 evidence, and then testimony from a fingerprint expert, DNA
18 expert, just to talk about the Collier blood, and --

19 MR. CHAKRAVARTY: Those are the main.

20 THE COURT: Tazhayakov?

21 MR. WEINREB: Tazhayakov we did not bring in today.

22 MR. CHAKRAVARTY: He is here today but we probably
23 won't get to him.

24 Just let me say on the record on Tazhayakov, not only
25 has the defense known that he is a cooperator who has already

1 testified in another case and is likely to testify in this
2 case -- this is for purposes of the record, to mute some of the
3 surprise expressed by the defense. The exhibits that he would
4 be testifying to are things like his plea agreement, text
5 messages from his telephone which are clearly marked in the
6 exhibit list. The exhibit which Miss Conrad asked about
7 yesterday, it's clearly marked in the exhibit list, described
8 what it is. The exhibits that he will be talking about are
9 bunched together on the exhibit list so it's clear that --
10 photos from his residence and from the backpack that was
11 disposed of are all in sequence. So there is absolutely no
12 risk of surprise when at least four months ago this information
13 was made available, and frankly, it was probably more
14 intuitive --

15 THE COURT: I'm interested in the near horizon.

16 MS. CONRAD: Can I -- there is an issue. If he's
17 coming in tomorrow, I still have a discovery issue on him, but
18 we could save that.

19 This business about the -- one thing I neglected to
20 say, some of the exhibits that were listed on this list we were
21 sent last night, we didn't even have those. We were sent those
22 after we got the list.

23 MR. WEINREB: Right, because they didn't exist until
24 minutes before we sent them --

25 MS. CONRAD: Well, you know, your Honor, I mean, I'm

1 not trying to dump on the government. I'm really not. We have
2 been moving at a pace much faster than we anticipated and that
3 has placed a burden on the government as well as a burden on
4 us.

5 And, you know, I certainly agree with Mr. Chakravarty
6 that we knew Azamat was going to testify but, unfortunately,
7 I'm not preparing my cross-examination and -- my witness
8 examination, you know, a week in advance. I'm looking at who's
9 coming up next for that week.

10 But if -- you know, the government legitimately asked
11 for time off yesterday to try and pull things together so that
12 we could get more organized. With respect to this point about
13 "We don't usually give them our load file," well, usually you
14 provide premarked exhibits, and this is the equivalent of a
15 premarked exhibit. But if the government is having trouble
16 putting this together in a fashion that they can give us enough
17 notice that we can adequately prepare to effectively represent
18 our client, then maybe we need to take a day or two off to
19 allow them the time to catch their breath and give them [sic]
20 what they promised yesterday they would give us.

21 THE COURT: Well, we'll have a day or two in the
22 next -- after tomorrow. So I'm -- that's when I say "the short
23 horizon." I'm interested in today and tomorrow. And
24 then -- so, now, for the rest of the trial, whatever the phrase
25 was, that's a week plus a day or two? Is that what you think

1 now? I mean, what --

2 MR. CHAKRAVARTY: We still think by the end of next
3 week we should be done.

4 THE COURT: All right. So, again, give or take --

5 MR. WEINREB: Give or take.

6 THE COURT: -- next week, maybe into the beginning of
7 the following week, maybe not?

8 MR. WEINREB: Yes.

9 THE COURT: Okay. So over the weekend all of what
10 we've been talking about, the matching up of exhibits as well
11 as, as best you can, with expected witnesses can be provided
12 before the start of the week?

13 MR. WEINREB: Yeah. We will provide -- as soon as we
14 actually have the list we will provide it to the defense. And
15 we'll provide it to them progressively so they're not sitting
16 around all weekend waiting for it. That's typically how we do
17 it. Witnesses come in, we prep them, we actually go through
18 the exhibits and then we put our list together. We're willing
19 to email it off as soon as we have it. So they'll have it
20 literally as soon as we have it.

21 I mean, we all had access to the exhibits. The only
22 thing we're talking about here is information about which ones
23 the government has selected to offer through which witness.

24 THE COURT: Okay. Is there any expert testimony today
25 and tomorrow?

1 MR. WEINREB: Yes.

2 THE COURT: Who?

3 MR. WEINREB: Patrick Moynihan is an fingerprint
4 expert. I don't think there was any *Daubert* motion with
5 respect to him. Jen Montgomery is a DNA expert. That's been
6 resolved. There's nothing left pending. Chris --

7 MR. WATKINS: May I just interrupt there? On
8 Ms. Montgomery, there is an issue that I want to flag for the
9 Court. In Mr. Weinreb's opening he talked about DNA on a set
10 of keys within the Civic. That was not noticed as part of
11 their Rule 16 disclosure back in December so we will object to
12 that. We were given no notice of that particular part on
13 Ms. Montgomery's testimony. The gloves will not be an issue.
14 That will not be anything. But the --

15 THE COURT: The keys aren't in her report?

16 MR. WATKINS: Pardon me?

17 THE COURT: The keys are not mentioned in her report?

18 MR. WATKINS: They're mentioned in her report; they
19 are not mentioned in the government's Rule 16 disclosure last
20 September.

21 MR. WEINREB: So the DNA test was done after that and
22 then we supplemented it.

23 MR. WATKINS: That's incorrect. It was in August and
24 there was no supplement.

25 MR. CHAKRAVARTY: There was a supplement to the report

1 that she would testify.

2 MS. CONRAD: Can we be provided with a copy of that
3 because we've been told before that we've been provided with
4 things that we haven't been provided with.

5 MR. WEINREB: They've had the report of the DNA
6 results since the day we had it.

7 THE COURT: I understand the issue and it will have to
8 be resolved.

9 MR. WEINREB: Chris Donohue is another fingerprint
10 expert. No issues with respect to him --

11 MS. CLARKE: Is he on today?

12 MR. WEINREB: No. Well, it depends how fast we go,
13 but I don't think so. He's on-call to come in. That's it.

14 MS. CONRAD: Can I just note I don't think he was even
15 on this list that we were sent last night.

16 MR. WEINREB: Yeah, because we don't expect to reach
17 him.

18 MS. CONRAD: But this was supposed to be through the
19 end of trial.

20 MR. WEINREB: I don't know why he's not on that list
21 but I mentioned him to you yesterday right after court. You
22 asked me about him and I told you.

23 MR. WATKINS: Again, many of these things are not
24 surprises. You're quite right, the exhibits may not be
25 surprises. The reason -- historically, of course, the Court

1 remembers a tremendous amount of discovery, lots of exhibits in
2 this case, so it's not the usual case here. And the government
3 resisted our motions for a continuance regularly saying they
4 were going to be ready for trial here, and that does include
5 notification of which exhibits go with which witnesses. And
6 that's why we are in this position that we are. We're moving
7 so very quickly that it's now less than 24 hours' notice that
8 we're getting of witnesses and exhibits. I'm sorry. I'm
9 taking Mr. Weinreb off of this.

10 MR. WEINREB: I disagree with what "ready for trial"
11 means but we don't need to debate it. I don't believe there
12 are any other experts.

13 MR. CHAKRAVARTY: Tomorrow the computer expert, Kevin
14 Swindon, who is going to be introducing a variety of the
15 computer evidence that was --

16 THE COURT: From various computers?

17 MR. CHAKRAVARTY: Various computers that were found --

18 THE COURT: So he will be a while, I would think.

19 MR. CHAKRAVARTY: I think so, just to mechanically go
20 through them. He's not going to do a deep dive into each of
21 them, but there were probably a dozen computers -- devices that
22 were talked about.

23 One of the issues with that is he kind of has a hard
24 date tomorrow because on Monday we have a terrorism expert
25 coming in.

1 THE COURT: Who?

2 MR. CHAKRAVARTY: Matt Levitt.

3 MR. BRUCK: That's Monday?

4 MR. CHAKRAVARTY: Monday. And he has --

5 THE COURT: Who are you going to call on terrorism
6 experts? Because there's a motion about them, right?

7 MR. CHAKRAVARTY: Right. Just Matt Levitt for
8 liability, and we'll see how the penalty phase plays out.

9 THE COURT: All right.

10 MR. CHAKRAVARTY: He's going to be a relatively narrow
11 witness but we have to get him on and off Monday. He's flying
12 back to Europe Monday evening. So in light of the fact that
13 some of the material he's going to be talking about, like
14 *Inspire* magazine and other things that were found on the
15 defendant's computer, Swindon has to testify on Thursday.

16 So if some of the locations -- we haven't presented
17 the search witnesses for some of those locations -- for
18 example, the landfill had a thumb drive in it -- we would ask
19 that Swindon be able to testify de bene to the fact that he
20 processed the -- that he extracted data from that thumb drive
21 and put it on a CD. And you will have a series of CDs that we
22 will be moving into evidence, and we'll later call the CD
23 person.

24 THE COURT: Okay.

25 MS. CONRAD: So tomorrow is just Swindon or is Azamat

1 tomorrow?

2 MR. CHAKRAVARTY: Azamat was scheduled for today.

3 MS. CONRAD: I know that.

4 MR. CHAKRAVARTY: We'll see how things play out today.

5 Swindon has to get on tomorrow. Azamat does not have to get
6 on.

7 MS. CONRAD: Okay. Can I ask my discovery question
8 about Azamat now? Is that appropriate?

9 THE COURT: Why don't you talk about it and see if you
10 can resolve it?

11 MS. CONRAD: Well, I've made an inquiry and I haven't
12 gotten a response back. We have a good couple of issues
13 about --

14 MR. WATKINS: I'm interested to hear which other
15 experts, for example, Cahill there is a motion in limine.

16 MR. WEINREB: I'm sorry. Cahill?

17 MR. CHAKRAVARTY: David.

18 MR. WEINREB: David Cahill is a ballistics expert.
19 He's going to testify that the Ruger casings and slugs that
20 were recovered at MIT and at Watertown matched the Ruger.

21 MR. WATKINS: And that was the subject of a motion in
22 limine where there's not yet been a ruling.

23 THE COURT: Right.

24 (Pause.)

25 THE COURT: I think my reaction when I read the papers

1 just a little bit ago was that it will depend on the foundation
2 that he establishes. I mean, the question as I understood it
3 was the reliability of the science of matching -- I forgot the
4 terms that he used, but striata or something.

5 MR. WEINREB: Striata, deformities.

6 THE COURT: Right. Frankly, it appeared to me to be
7 likely admissible, but I would hear the -- and if it was
8 necessary to have a voir dire, we could do that. That was my
9 reaction.

10 MR. WATKINS: We've requested a voir dire before that
11 evidence comes in.

12 THE COURT: All right. We can do that.

13 MR. WEINREB: That's fine.

14 MR. WATKINS: And so that would be today also, do you
15 anticipate?

16 MR. WEINREB: That will likely be today. That will be
17 today.

18 THE COURT: Okay.

19 MR. WATKINS: Your Honor --

20 MS. CLARKE: There are a couple of other -- yeah.

21 MR. WATKINS: I would say I'm not prepared for that
22 particular aspect of the trial. Again, most of these
23 witnesses, as the Court has seen, are my witnesses going
24 forward here. Had I known that there was going to be a voir
25 dire on the reliability today, I would have turned my focus to

1 that particular issue. I have not done so because I'm
2 concentrating, and was concentrating all last night, on the
3 exhibits that the government was able to identify with
4 particular witnesses, but not until yesterday.

5 So I would ask that we put the voir dire and Trooper
6 Cahill off to a different time so I'd be able to prepare for
7 that aspect of the case, which I did not know was going to
8 happen today.

9 MR. WEINREB: Your Honor, I'd object to that. We
10 are -- because of the rapidity with which the trial has moved,
11 we're doing a lot of people's schedules. People absolutely
12 have to get on at certain points or the trial is going to be
13 over before they have an opportunity to testify.

14 Ballistics matching is something that has been going
15 on in courtrooms for decades. The issue was briefed months and
16 months and months ago. It's something that I don't
17 think -- it's not a -- it doesn't involve complicated science.
18 You match ballistics by taking pictures of a test fire and
19 looking at pictures of actual things and see if you can match
20 them up. I don't believe that this expert in particular is one
21 who warrants being put off someplace completely out of order
22 for this kind of voir dire, this kind of routine.

23 THE COURT: How long will he be?

24 MR. WEINREB: As a witness?

25 THE COURT: Hmm.

1 MR. CHAKRAVARTY: Maybe an hour.

2 MR. WEINREB: An hour? I know it's tough to say
3 but -- yeah, he collected all of the ballistics evidence, so
4 without him none of it is going to come into evidence. We have
5 people here who, you know, diagrammed where it was and so on.
6 And he's sort of an essential piece of the puzzle.

7 So he collected every single piece of ballistics
8 evidence, both at MIT and in Watertown, and can say where it
9 all was when he collected it, and he then did the test fires,
10 compared it. He can say that the Tsarnaev brothers -- he can
11 say that none of the other officers were firing a Ruger. I
12 mean, there are a lot of very important things that he needs to
13 say that have nothing to do with his expertise, but we need his
14 expertise as well.

15 MS. CONRAD: May I suggest that perhaps, then, his
16 testimony could be bifurcated?

17 MR. WEINREB: That would make no sense. Again, it's
18 going to confuse the jury more than it's going to help them.
19 Again, we're not talking about DNA mixtures or something
20 complicated here.

21 THE COURT: Yeah, I frankly don't think that -- I'll
22 give you the chance at the voir dire, but I frankly don't think
23 that it's going to alter the likelihood of his testifying to an
24 opinion. So I think we can go forward with it.

25 MR. WATKINS: May I just ask a question because this

1 brings up something new? I did not understand Trooper Cahill
2 to be testifying to actually picking things up. None of the
3 exhibits seem to be tied to those particular picking up. What
4 we have are pictures of the -- right. The comparison pictures.
5 The exhibits, as far as picking things up, are not tied to him.

6 THE COURT: All right.

7 MR. WATKINS: I thought it was a complete --

8 THE COURT: You had something else?

9 MS. CLARKE: I had just a couple --

10 Did you want to raise them, though?

11 Just a couple of things. There's a Kelley King on the
12 witness list, your Honor, that I don't think was on the
13 statutorily required list production and we have no exhibits
14 and no idea what Kelley King is on the list for. And then
15 there's a Christopher Derks that we've been advised will be
16 putting on items seized at Norfolk. And as you might imagine,
17 there were lots of items seized at Norfolk, and we really would
18 need to know what the government is putting in to see if
19 there's a completion picture that we need to put in. So we're
20 concerned about that because we've got no exhibits on it. And
21 so --

22 MS. PELLEGRINI: Actually, I think Norfolk is on the
23 2D. So the exhibits that are listed there --

24 MS. CONRAD: There are no exhibits listed.

25 MS. PELLEGRINI: I'm sorry?

1 MS. CONRAD: What we got yesterday did not list any
2 exhibits for Derks.

3 MS. PELLEGRINI: But it might have said the 2D,
4 because the exhibits are listed there as well as pictures.

5 THE COURT: How about the first one?

6 MR. WEINREB: Kelley King did two things: She
7 collected the white gloves from the Honda and put them in an
8 evidence bag. I mean, other people saw her do it, so she's not
9 actually essential for that purpose. And she also swabbed the
10 keys for a sample of blood. Again, I suppose she's not
11 essential for that purpose because it was -- other people
12 witnessed enough of it that -- so. But she's a minor witness.
13 So she'll be on and off the stand, from our perspective, in ten
14 minutes. I don't think there's anything controversial about
15 her testimony.

16 MR. WATKINS: One more lingering issue from yesterday.
17 There was the issue about the sweatshirt and the jacket coming
18 in. We had conversations afterwards about how to sort through
19 that immediately rather than putting us on.

20 I was under the impression that the jacket and the
21 sweatshirt would be here today to be introduced
22 through -- actually, at least one witness with personal
23 knowledge that was at the hospital that got our guy's
24 sweatshirt, Dzhokhar's sweatshirt, and that another witness
25 would be able to testify to the jacket coming in to the

1 Massachusetts State Police.

2 We do not have those physical items today. The
3 government has them obviously, but they are not here today,
4 which leaves me in a difficult position of how to introduce
5 what we need to introduce without the physical item here.

6 We talked about pictures. The only picture I can get
7 my hands on right away is the one that's in evidence with him
8 climbing out of the boat with his hands up. So I would propose
9 that I could put that in through the witness D.J. Fife, who is
10 the one who collected it from the hospital. He would then be
11 able to identify that sweatshirt as the one that he picked up,
12 and then we're on our way, as far as if that is agreeable to
13 the government.

14 MR. WEINREB: So pictures of the items of the
15 defendant's clothing that were seized in the hospital room were
16 produced in discovery. I have them upstairs. I'm perfectly
17 willing to get Mr. Watkins what he needs. And in addition, we
18 won't object to the actual clothing coming in later,
19 essentially by stipulation. We don't have to actually read a
20 stipulation to the jury; we just won't object. The only thing
21 is that I would need a minute to go up there and find it and
22 print it out for him, but I'm certainly willing to do that.

23 As for Tamerlan Tsarnaev's jacket, I assume we have a
24 picture of that that I could lay my hands on and I'm willing to
25 do that. Alternatively, we could just agree that it will just

1 come in later on somehow and make it clear to the jury that
2 it's coming, but it's Tamerlan Tsarnaev's jacket. It's
3 biohazard evidence, which is why we don't keep it here, just
4 like we don't keep the ballistics here and other stuff here.
5 It's kept in a special place. But we can have it brought in.

6 MS. PELLEGRINI: I don't think it can be opened.

7 MR. WEINREB: Yeah, I don't think it can be opened,
8 but at least we could say it and there would be a picture of
9 it.

10 MR. WATKINS: The difficulty in it coming in later, of
11 course, is that we're about to move away from the Watertown
12 scene, which is where temporarily these things came in.

13 THE COURT: Well, will a picture do? This is light or
14 dark, isn't it? Isn't that the issue?

15 MR. WATKINS: Yes. And that's why actually having it
16 physically in the courtroom is --

17 THE COURT: Well, it depends on how good the picture
18 is, I guess.

19 MR. WATKINS: And if I had known -- again, this is the
20 pace we're moving at.

21 THE COURT: Or perhaps a stipulation that it was a
22 dark jacket.

23 MR. WEINREB: I think we could have it brought over
24 during lunchtime. I mean, it's in Boston. It's probably over
25 at the JFK. So I'll ask one of the agents to get it and bring

1 it.

2 MR. WATKINS: I suspect the witness will be off the
3 stand by that point.

4 MR. WEINREB: I mean, we could do it.

5 MS. CONRAD: How about the morning recess?

6 THE COURT: Well, whatever.

7 MS. CONRAD: May I raise --

8 THE COURT: Wait a minute. I want to --

9 MS. CONRAD: Sure.

10 MR. BRUCK: One quick thing. The second witness
11 today, Matthew -- Trooper Hess, as I understand it, is going to
12 introduce the CD of the nasheeds, the Arabic vocal music that
13 Mr. Dun Meng described as weird. I understand there are things
14 about this that arguably are relevant, but we think that the
15 music itself is not and will do nothing but create prejudice
16 and bias. It is simply a cultural divide between Middle
17 Eastern music and -- which in this context will sound hateful
18 and disgusting. I mean, that's -- you know, and that burdens
19 the obligation of the jury not to consider religion and
20 national origin and everything else in their sentencing
21 decision in a capital case.

22 I don't think the Court has to rule on it today.

23 We're just going to object to it coming in today. It can be
24 identified. There won't be a problem about chain of custody
25 but --

1 THE COURT: Were you going to play it?

2 MR. BRUCK: -- the actual playing of the MP3
3 digital --

4 MS. PELLEGRINI: It will be played later.

5 MR. CHAKRAVARTY: Later.

6 THE COURT: So it doesn't have to be -- just to be
7 obscure about it, I think it's likely it will get played.

8 MS. CONRAD: I think if it's not going to get played,
9 then it should be marked for identification.

10 MS. PELLEGRINI: No, I think it comes in.

11 MS. CONRAD: Then we have an objection to it coming
12 in. That's the point.

13 THE COURT: I expect I will admit it over objection.

14 MR. BRUCK: Well --

15 THE COURT: I understand the objection.

16 MR. BRUCK: Okay. I want to be clear that it is as a
17 constitutional basis and the due process clause as well as the
18 statute.

19 THE COURT: All right.

20 MS. CONRAD: So first of all, I just wanted to
21 clarify. Kelley King: Our objection based on the statutorily
22 required list is overruled or is she not going to testify?

23 THE COURT: I think it's trivial, from what I hear, so
24 I guess it's overruled.

25 MS. CLARKE: Do we need to object when she takes the

1 stand?

2 THE COURT: No, I think this is sufficient. This is
3 sufficient.

4 MS. CONRAD: This is on a -- first of all, I also
5 wanted to -- to the extent the government is going to provide
6 us something over the weekend on a rolling basis, which is
7 great, again, if we could just either get the load file or get
8 something that associates the exhibit numbers with a Bates
9 number or some other identifier that we can match it up in our
10 database and that --

11 MR. WEINREB: That we cannot do. Bates numbers --

12 MS. CONRAD: Well, what about the load file?

13 MR. WEINREB: -- is not something we have an index
14 anything to.

15 MS. CONRAD: Apparently, the load file is a substitute
16 for --

17 THE COURT: Well, okay. I don't want to get into this
18 here.

19 MS. CONRAD: It's like a premarked exhibit.

20 THE COURT: I want the government to do its best to
21 provide guidance as to which witnesses will have which exhibits
22 within practical limits, okay? And now I want to start the
23 evidence.

24 MS. CONRAD: Well, I have two things that are related
25 to exhibit numbers, and one is really housekeeping and the

1 other is just something that I think the Court should be aware
2 of. The government has been, I think appropriately, providing,
3 except for -- well, with one, maybe, exception -- providing
4 exhibits -- copies of exhibits that have been admitted to the
5 press. And apparently there is a website or some electronic
6 medium where the press can access that.

7 Yesterday a photograph -- or a portion of a photograph
8 was introduced from the -- of Mr. Tsarnaev with the Arabic
9 flag. And apparently, as presented on this website, it was
10 presented not with its exhibit number but with a caption that
11 indicated that it came from Mr. Tsarnaev's Instagram account
12 with the caption "My Flag." And this was picked up on by the
13 press and by the media.

14 And I would ask that that be corrected, and that if
15 the government is going to provide exhibits -- we have the
16 link. Mr. Chakravarty's shaking his head. We have the link.

17 MR. CHAKRAVARTY: Because that photo was from an
18 Instagram. Instagram is something intended for the public.

19 MS. CONRAD: That's not a live Instagram account.
20 That's not how it came in. There was no testimony about it.
21 If the government is going to provide exhibits to the press,
22 the only identifier on them should be an exhibit number. A
23 caption that was not a file or a caption that was not
24 introduced should not be on there during trial. It is a
25 violation of the local rules regarding extrajudicial

1 statements.

2 MR. CHAKRAVARTY: We did not provide that image. We
3 provided the image that was introduced in court with the
4 exhibit number.

5 MS. CONRAD: With the filing.

6 MR. CHAKRAVARTY: And because this is something that
7 was like a Twitter account at one point --

8 THE COURT: Somebody could use that to go find it.

9 MR. CHAKRAVARTY: They found it on the Internet, they
10 downloaded it and they put it out --

11 MS. CONRAD: That's just not my information. And the
12 Instagram account is not live. And I think Mr. --

13 THE COURT: Okay. What's the other?

14 MS. CONRAD: The other one is at some point I just
15 want to make sure the jury is told that the exhibits originally
16 admitted at Defendant exhibits 1 and 2 have actually been
17 renumbered as Exhibit 3000 and 3001 respectively.

18 MR. CHAKRAVARTY: Your Honor, one final point on that,
19 and just because I don't want to belabor it, but if the defense
20 wants to introduce exhibits from Norfolk Street, for example,
21 which there's a series of exhibits in our exhibit book which
22 are all from Norfolk Street, I think they're pretty clearly
23 marked as being from Norfolk Street. But if it's not
24 all-inclusive, then, as we're learning with regards to the
25 clothing, it will take some transit time to go into the JFK

1 building where the stuff is stored and transport it here.
2 We'll need at least 24 hours to make those arrangements because
3 there's not somebody permanently manned there.

4 THE COURT: All right.

5 (The proceedings adjourned at 9:41 a.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of
the United States District Court, do hereby certify that the
foregoing transcript constitutes, to the best of my skill and
ability, a true and accurate transcription of my stenotype
notes taken in the matter of Criminal Action No. 13-10200-GAO,
United States of America v. Dzhokhar A. Tsarnaev.

10 /s/ Marcia G. Patrisso
11 MARCIA G. PATRISSO, RMR, CRR
11 Official Court Reporter

Date: 10/13/15